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FILED

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 13 ORIGINAL

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW JERSEY, ET AL.,

Defendants

**MOTION FOR LEAVE TO INTERVENE,
PROPOSED ANSWER AND BRIEF OF
INSURANCE COMPANY OF NORTH AMERICA**

ROBERT B. ELY, III,

*Attorney for Applicant, Insurance
Company of North America.*

1600 Arch Street,
Philadelphia 3, Penna.

MOTION FOR LEAVE TO INTERVENE.

And now this 3rd day of January 1963 comes Insurance Company of North America by its undersigned attorney and moves for leave to intervene as a defendant for the purpose of arguing that (a) the situs of intangible personal property of the type involved in the main proceedings is in the State in which the corporate obligor maintains its principal place of business; (b) neither Texas nor Pennsylvania has legislation providing for the escheat or custodial taking of such property, even if it be found to have a situs within either of these States; and (c) Applicant is under no obligation to pay over either to Texas, New Jersey or Pennsylvania any of the personal property described in its annexed proposed answer.

In support of this motion Applicant alleges the facts set forth in its annexed proposed Answer and advances the arguments set forth in the annexed Brief.

Proof of Service is hereto annexed.

Respectfully submitted,

ROBERT B. ELY, III,
Attorney for Applicant
Insurance Company of North America.

Philadelphia, Pennsylvania
January 4, 1963

PROPOSED ANSWER.

The intervening Defendant Insurance Company of North America, makes the following Answer to the successive paragraphs of the Complaint of the State of Texas as follows, and further alleges the New Matter thereafter set out:

I to V. Admitted.

VI to XII. Intervenor has no knowledge of the facts alleged and demands proof if material.

XIII and XIV. Intervenor is unable to affirm or deny the legal conclusions asserted as to the situs of intangibles of the type in controversy until this Court selects the correct rule, as Intervenor prays it may do.

XV. Intervenor concurs in the legal conclusion that Pennsylvania "lacks the power to escheat, and/or take custody of, the said property", regardless of whether its situs is in said Commonwealth, but for the reason that its General Assembly has ~~not~~ enacted any legislation exercising such power.

XVI. Intervenor has no knowledge of the facts alleged and demands proof if material.

XVII and XVIII. Admitted.

XIX. Intervenor joins in prayers (1) and (2) of the Plaintiff, that the Court take jurisdiction of the subject matter, and that it hear and determine the controversy among the parties. Intervenor's further prayers are recited below.

NEW MATTER.

XX. Intervenor is a corporation organized under the laws of the Commonwealth of Pennsylvania with principal place of business in the City and County of Philadelphia.

It is authorized to and does in all States of the Union, as well as in the District of Columbia, all forms of insurance except life, annuities, and title insurance.

XXI. Intervenor issues and will continue to issue checks and drafts at the rate of about one million items per year; and in numerous instances these instruments have remained and will remain uncashed for more than seven years.

XXII. With respect to varying numbers of such checks and drafts there have existed or occurred in each of the States of Texas, New Jersey and Pennsylvania, as well as in most of the other States of the Union, one or more of the following circumstances:

a. The depositary upon which the instrument was drawn.

b. The office of the agent of intervenor issuing the instrument.

c. The place of delivery of the instrument.

d. The last known address of the payee of the instrument.

e. The place of purchase, the place of delivery, or both, of the goods, wares or merchandise for which the instrument was issued in payment.

f. The place of contracting for, the place of rendering, or both, of the services for which the instrument was issued in payment.

g. The place in which occurred the loss insured by intervenor, for which the instrument was issued in payment.

h. The place in which was made the contract of insurance under which such loss occurred.

i. The location covered under such contract of insurance.

[If this Answer is permitted to be filed, there will be attached an Exhibit detailing these circumstances as to each item currently unpaid for more than seven years.]

XXIII. In no case of these uncashed checks or drafts has any legal action been brought to recover either the amount thereof or to enforce the obligation for payment of which the instrument was issued.

XXIV. It is provided by the Pennsylvania Act of 1713, Smith Laws 76, 12 Purdon's Supplement 31, that "all actions of debt granted upon any lending or contract without specialty . . . shall be commenced and sued within the time and limitations hereafter expressed, and not after; that is to say . . . the said actions for . . . debt . . . within six years next after the cause of such actions or suit, and not after."

XXV. The Texas Statute of Limitations (Vernon's Statutes sec. 5527) as to claims of the type here in controversy reads in relevant part:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."

WHEREFORE, Intervenor, Insurance Company of North America, prays that the Court, after such hearing as it may direct, may conclude

(a) That the personal property listed in the Exhibit to this Answer and held by Intervenor has a situs in Pennsylvania;

(b) That Pennsylvania has no legislation providing for the escheat or custodial taking of such property; and therefore

(c) Intervenor is under no duty to report or pay over to any State, with or without escheat, any portion of such property.

ROBERT B. ELY, III,
Attorney for Intervenor
Insurance Company of North America

BRIEF.

a) *Reports of Opinions of Courts below*

There are none; since these proceedings are in the Court's original jurisdiction.

b) *Grounds for invoking the Court's jurisdiction*

In accordance with *this Court's Rule 9.2*, providing that "... motions in original actions shall be governed, so far as may be by the Federal Rules of Civil Procedure," Applicant invokes this Court's jurisdiction to permit intervention upon the basis of *F.R.C.P., 24(a) and (b)* reading in relevant parts: "(a) *Intervention of Right*. Upon timely application anyone shall be permitted to intervene in an action . . . (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . (b) *Permissive intervention* . . . (2) When an applicant's claim or defense and the main action have a question of law or fact in common.

c) *Statutes involved*

Pennsylvania Act of 1713, 1 Smith Laws 76, 12 Purdon's Supplement 31, reading in relevant part:

"all actions of debt granted upon any lending or contract without specialty . . . shall be commenced and sued within the time and limitations hereafter ex-

pressed, and not after; that is to say . . . the said actions for . . . debt . . . *within six years next after the cause of such actions or suit, and not after.*" (Emphasis supplied.)

Texas Statutes of Limitations, Vernons Statutes Art. 5527.

"There shall be commenced and prosecuted *within four years after the cause of action shall have accrued*, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing." (Emphasis supplied.)

The relevant portions of Pennsylvania's Escheat Laws, Act of 1889, P.L. 66, Sec. 3, as amended by the Act of 1953, P.L. 986, No. 247, Sec. 1, 27 P.S. 333 (b) and (c), and of Texas' Unclaimed Property Laws, Vernon's Statutes Articles 3272 and 3272(a), *both providing for periods of dormancy of seven years*, are set out on pages C1 to C3 and A1 to A3 of the Texas Brief in support of Motion for Leave to File Complaint.

d) *Question presented*

Should a timely application to intervene be granted in an escheat contest among three States having various contacts with certain unpaid checks, where:

(1) the Applicant, which has issued similar instruments under similar circumstances, and the original parties all raise the same legal question of escheat situs of such debts;

(2) Applicant questions the applicability of the escheat laws of two of these States to such instruments, even if their situs were found to be in either or both of these States;

(3) Judgment in the main action is almost certain to decide both questions and to bind Applicant as well as the original parties;

(4) Applicant's interest in the second question is opposed by one original party (the State of its incorporation and main office) both here and in other litigation pending against Applicant, and cannot be supported by the other principal parties?

e) *Statement of the Case*

These are proceedings in the Court's original jurisdiction, in which Texas asserted in its Complaint (paragraph XIX), in opposition to the alleged claims of New Jersey and Pennsylvania, "The state of Texas, alone has the power to assert a claim of escheat against [certain property and is alone authorized to proceed, in accordance with the statutes of Texas governing escheat to obtain a judgment declaring said property escheated to the state of Texas.]"

The property is described (Complaint paragraph XI) as approximately \$38,000 in miscellaneous sums of money allegedly owed by a New Jersey corporation having offices in Pennsylvania and Texas (Complaint, paragraph V), which the Company is alleged (Complaint, paragraph VII) to consider "subject to escheat to Texas."

In its Answer (paragraph XIX) New Jersey contests the claim of Texas and prays for a decree "that the State of New Jersey has sole and exclusive power to take custody of intangible personal property of the nature involved in this action and to escheat same if said property continues to remain unclaimed for the period of custody provided by New Jersey law."

Pennsylvania (in paragraph XIX of its Answer) prays for "a decree . . . recognizing the Commonwealth of Pennsylvania's right to escheat or take into custody all or any part of the funds or other property in question."

Defendant Sun Oil Company (in paragraph XI of its Answer) admits that it has filed a report of the property

in question as escheatable to Texas, but reserves the right "to claim any offsets, counterclaims, limitations or other defenses it may have under the custodial, unclaimed property or escheat laws of the State or States determined to have jurisdiction."

f) *Argument*

Applicant is incorporated under the laws of one of the States parties to the main action. It has offices in all of these States. It has issued to payees with last known addresses in all of these States unpaid checks and drafts of the type involved here. See attached Proposed answer.

These circumstances raise the same legal questions as are raised by the Answer of the Defendant Sun Oil Company:

(a) What is the situs of such intangible personal property for purposes of escheat or custodial taking?

(b) Does the law of the State of situs provide for such escheat or taking?

The existence of these common questions is sufficient for permissive intervention under *Federal Rules of Civil Procedure 28(b)*, *supra*.

Furthermore, Applicant's interest in these questions, which a judgment in the main action will decide in a manner binding on Applicant, is adversely, rather than adequately represented by the present parties. These are the conditions for intervention as of right under *Federal Rules of Civil Procedure 28(a)*, *supra*.

From previous decisions and from this Court's discussion during arguments on *Western Union v. Commonwealth of Penna.*, 368 U. S. 71 82 S. Ct. 199 (1961), it seems that the most likely criteria for situs are: State of incorporation of the corporate obligor, or of its principal place of business (favored by Applicant) or of last known address of payee. Any of these would place the situs of some or all of Sun Oil's and of Applicant's unpaid checks and drafts in Texas, Pennsylvania or New Jersey. This

raises the question of the sufficiency of the laws of these States to provide for escheat or collection of such items. The decision of this question will bind Sun Oil, Applicant and all similarly situated corporations.

Applicant contends that the laws of Pennsylvania and Texas do not provide for such escheats or takings. None of the present parties can or does advance this argument. Applicant's representations by them is inadequate and, in fact, adverse.

None of the States can or does presume to argue the sufficiency of either of the other States' internal escheat laws. Each State merely denies that the situs of the property in question is in either of the other States. (See Complaint of Texas, paragraphs XIV and XV; Answer of Pennsylvania, paragraphs X and XI; Answer of New Jersey, paragraphs IX and XVIII.)

Pennsylvania has already contested with Applicant the sufficiency of its escheat laws as to property of the type in question in *Alpern v. Ins. Co. of North America*, 77 *Dauphin County Reports* 383 (1961). In affirming that this action was brought in the wrong court, the Supreme Court of Pennsylvania recited in *Stahl v. Ins. Co. of North America*, 408 Pa. 483, 184 A. 2d 568 (1962) the announced intention of the Commonwealth to pursue its litigation with Applicant "in the proper tribunal." Such a suit has, in fact, begun in the Court of Common Pleas No. 5 of Philadelphia County, as of December Term, 1962, No. 771. Pennsylvania's representation of its domestic corporations is therefore adverse on the issues here involved.

Any judgment favorable to Pennsylvania in the present main action will be used by it against Applicant, in that Philadelphia suit.

Sun Oil Company would be hard put to represent Applicant; since Sun has *conceded its checks are escheatable to Texas* under laws no more effective than Pennsylvania, as argued below. See Answers of Sun Oil, paragraph VII and Complaint of Texas, paragraph VII. Thus, the reservation in paragraph XI of Sun's Answer

of the right to contest Pennsylvania and Texas escheat laws, may not be effective either for it or for Applicant.

Actually, neither Texas nor Pennsylvania legislation provides for escheat or collection of property of the type involved here; since in each of these States the Statute of Limitations (See Section c above) runs before the period of dormancy for escheat expires (See Brief of Texas in Support of Motion for Leave to File Complaint pp. A1 to A3 as to Texas laws and pp. C1 to C3 as to Pennsylvania). These Statutes of Limitations bar actions for debts of the type here involved after 4 and 6 years, respectively, while the periods of dormancy are 7 years in both cases.

To provide for escheat of collections such as sought here requires either

a) a period of dormancy shortened to less than that of limitations, as in New Jersey's Act of 1951, N.J.S.A. 2A-37-29 (Texas Brief, *supra*, p. B1) and in Rhode Island's General Laws, Chapter 33-21-28;

b) A removal* of the bar of limitations as in Pa. Act of 1915 P.L. 878, sec. 15, 27 P.S. 261, dealing with banks *not here involved*; Pa. Act of 1937 P.L. 2063, sec. 13, 27 P.S. 446, dealing with specialty debts *not here involved*; Pa. Act of 1949 P.S. 1140, sec. 13, 27 P.S. 473, dealing with life insurance companies *not here involved*;

Arizona	Code of 1956, Sec. 44.365.01
California	Laws of 1959, Ch. 1809, Sec. 1515
Delaware	Code of 1953, Sec. 1140
Michigan	Statutes Annotated, Sec. 1153 (59)
New Mexico	Laws of 1959, Ch. 132, Sec. 17
New York	Abandoned Property Law, Sec. 1400
Oregon	Revised Statutes, Sec. 98.376
Virginia	Laws of 1960, Ch. 330, Sec. 55.210.17

* Prospectively operative if fairly enacted.

These requirements have not been met by either Texas or Pennsylvania as to the property here involved, nor by Arkansas, Connecticut, Florida, Idaho, Kentucky, Louisiana, Massachusetts, North Carolina, Oklahoma, Utah, and Washington, mentioned in paragraph VI of the Complaint as having abandoned property statutes.

As to *timeliness* of the present Application: It could not have been made until the answers of all original parties were filed, so that Applicant could know and analyze their positions. This having been done, Applicant has proceeded with all deliberate haste.

As to the *effect of intervention*: it would not complicate or delay the main action; since it would introduce no new questions, but would allow those presented to be argued more fully and from all sides, which might not be possible if Sun Oil Company were the only private defendant.

Respectfully submitted,

ROBERT B. ELY, III,
Attorney for Applicant Insurance Company of North America.

PROOF OF SERVICE.

I, Robert B. Ely, III, Attorney for the Applicant Insurance Company of North America and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of January 1963 I served copies of the foregoing Motion for Leave to Intervene, Proposed Answer and Brief, on each of the parties to the main proceeding, by depositing copies in a United States post office or mail box, as certified mail with first class or air mail postage prepaid, as indicated, and addressed to

Proof of Service.

- (1) Honorable Price Daniel
Governor of Texas
State Capitol
Austin, Texas (By Air Mail)
- (2) Honorable Will Wilson
Attorney General of Texas
Courts Building
Austin 11, Texas (By Air Mail)
- (3) Honorable Richard J. Hughes
Governor of New Jersey
State Capitol
Trenton, New Jersey
- (4) Honorable David D. Furman
Attorney General of New Jersey
State Capitol
Trenton, New Jersey
- (5) Honorable David L. Lawrence
Governor of Pennsylvania
State Capitol
Harrisburg, Pa.
- (6) Honorable David Stahl
Attorney General of Pennsylvania
State Capitol
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- (7) Henry A. Frye, Esq.,
Attorney for Defendant Sun Oil Company
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ROBERT B. ELY, III,
Attorney for Insurance Com-
pany of North America,
Applicant for Intervention.